

ORDER NO. 2077

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;
Mark Acton, Vice Chairman; and
Robert G. Taub

Request to Add Private Address Forwarding
to the Market Dominant Product List

Docket No. MC2013-60

ORDER REJECTING REQUEST TO ADD PRIVATE
ADDRESS FORWARDING TO THE PRODUCT LISTS

(Issued May 9, 2014)

Petitioner Sai (Petitioner) requests that the Commission add a new proposed product, Private Address Forwarding (PAF), to the Mail Classification Schedule (MCS) as a market dominant special service. For the reasons discussed below, the Commission rejects the request.

I. PROCEDURAL HISTORY

On September 18, 2013, Petitioner filed a request asking the Commission to add PAF to the MCS as a market dominant special service.¹ The Commission issued a notice and order appointing a Public Representative and providing the Postal Service

¹ Request to the Postal Regulatory Commission Under 39 U.S.C. 3642 and 39 C.F.R. 3020.50 to Add Private Address Forwarding to the Mail Classification Schedule, September 18, 2013 (Request).

and interested persons with an opportunity to comment on the Request.² On November 4, 2013, Petitioner amended his PAF proposal.³

On October 17, 2013, the Postal Service submitted its preliminary views, asking the Commission to reject the Request.⁴ The Public Representative, the Association for Postal Commerce (PostCom), and Chris Phoenix submitted comments on the Request and the Postal Service's Preliminary Views.⁵ The Postal Service submitted reply comments on December 20, 2013.⁶ That same day, Petitioner submitted a motion, requesting, *inter alia*, that the Commission issue various declarations, institute further proceedings on the Request, provide for a period of discovery, and issue a subpoena directing the Postal Service to produce documents.⁷ On January 6, 2014, the Postal Service filed an answer in response to Petitioner's Omnibus Motion, asking the Commission to deny the motion and reject the underlying Request.⁸ On January 13,

² Notice and Order Concerning Request to Add Private Address Forwarding to the Market Dominant Product List, September 23, 2013 (Order No. 1838). At the request of the Petitioner and the Public Representative, the Commission subsequently modified the procedural schedule. See Order Modifying the Procedural Schedule, October 23, 2013 (Order No. 1858).

³ Petitioner's Motion to Amend Private Address Forwarding Proposal, November 4, 2013 (Motion to Amend). The Motion to Amend is granted.

⁴ Comments of the United States Postal Service in Response to Notice and Order Concerning Request to Add Private Address Forwarding to the Market Dominant Product List, October 17, 2013 (Preliminary Views).

⁵ Public Representative Comments, November 18, 2013 (PR Comments); Comments of the Association for Postal Commerce, November 18, 2013 (PostCom Comments); Reply Comment by Chris Phoenix to USPS' Comments on Private Address Forwarding Proposal, October 21, 2013 (Phoenix Comments).

⁶ Reply of the United States Postal Service to Comments in Response to the Request to Add Private Address Forwarding to the Market Dominant Product List, December 20, 2013 (Postal Service Reply Comments).

⁷ Petitioner's Motion for Declarations, Further Proceedings, Disclosure, and Appearance; or in the Alternative, for Suspension Pending FOIA Appeals, December 20, 2013 (Omnibus Motion). Petitioner subsequently filed two addenda to his motion. Addendum to Closing Motion, December 23, 2013 (First Addendum); Addendum to Closing Motion – USPS Partial FOIA Response, December 26, 2013 (Second Addendum).

⁸ Reply of the United States Postal Service to Petitioner's Pleadings Dated December 20, 23 and 26, January 6, 2014 (Answer). The Postal Service also filed a motion for late acceptance of its Answer. Motion of the United States Postal Service for Leave to File a Late Reply to Petitioner's December 20th

2014, Petitioner submitted a surrebuttal, responding to the Postal Service's Answer.⁹ On January 21, 2014, the Postal Service submitted a reply, responding to the Surrebuttal.¹⁰

On October 21, 2013, Petitioner filed a motion asking the Commission to order the Postal Service to produce documents relating to internal Postal Service product concepts with similarities to his PAF proposal.¹¹ The Postal Service filed an answer opposing the Motion for Disclosure on October 28, 2013.¹² On November 5, 2013, the Commission denied the Motion for Disclosure as premature.¹³

II. THE PROPOSAL

A. Initial Proposal

As initially proposed, PAF is a service whereby mail customers could have mail that is addressed to a unique alphanumeric identifier (PAF-Id) delivered to a physical address specified by the customer. Request at 1. For an additional fee, customers would be permitted to have the mail forwarded to a different physical address. *Id.* at 2-3. The Postal Service would be prohibited from disclosing the physical address or the identity associated with the PAF-Id, except with the customer's consent, or pursuant to a valid subpoena or warrant. *Id.* at 3. The Postal Service would be required to refuse PAF service to customers who have abused the service, who have a legal obligation to

Motion, December 27, 2013. Petitioner concurs with the motion for late acceptance. See Response to USPS MLA, December 30, 2013. The motion is granted.

⁹ Petitioner's Reply to USPS' Response to Closing Motion, January 13, 2014 (Surrebuttal). Petitioner also filed a motion for late acceptance of his Surrebuttal. Petitioner's Motion for Late Acceptance, January 7, 2014. The motion is granted.

¹⁰ Comments of the United States Postal Service in Response to Petitioner's January 13th Reply, January 21, 2014 (Reply to Surrebuttal).

¹¹ Petitioner's Motion for PRC Order for Disclosure of Related USPS Documents, October 21, 2013 (Motion for Disclosure).

¹² Reply of the United States Postal Service to Motion of Petitioner Seeking Order Authorizing Discovery, October 28, 2013.

¹³ Order Denying Motion for Disclosure, November 5, 2013 (Order No. 1868).

disclose their physical location, or who have been convicted of certain crimes. *Id.* at 2. Customers would be required to pay \$35 per year for one PAF-Id and \$25 per year for each additional PAF-Id. *Id.* at 3. In addition, customers would be charged a one-time fee of \$5 to change the forwarding address associated with the PAF-Id and \$5 per basket per week to have their PAF mail held. *Id.* Though he defers to the Postal Service and the Commission on how it should be classified, Petitioner believes that PAF would be a market dominant product of general applicability. *Id.* at 4.

Petitioner states that PAF would offer various benefits. He states that PAF would permit customers to receive mail without disclosing their identity or physical address, would be less costly to operate than post office box service because it would not require additional physical space, would save costs associated with mail forwarding when customers change physical addresses, would be compatible with credit card address based authentication, and would provide a service that is not currently offered by private parties. *Id.* at 4-5.

B. Amended Proposal

Petitioner seeks to modify his initial proposal in several ways. He proposes to make the grounds for which the Postal Service refuses service to PAF customers the same as those for which it refuses post office box service. Motion to Amend at 1-2. He also would permit the Postal Service to implement PAF service incrementally, initially restricted to letters, with parcel service added later. *Id.* at 1. In addition, Petitioner amends the proposal to permit PAF customers to restrict the delivery of mail of certain size or mail categories. *Id.* at 2. He also would require the Postal Service to create a public application programming interface and website from which senders can confirm the validity of, and delivery restrictions associated with, PAF-Ids. *Id.* at 3.

Petitioner also proposes to amend PAF pricing, permitting each person to have one PAF-Id free-of-charge while charging bulk users (*i.e.*, those receiving more than 3,500 pieces of mail each year) fees based upon usage. *Id.* at 3. The amended proposal includes additional fee-based services, which would permit customers to

transfer ownership of PAF-Ids, register multiple forwarding addresses to a single PAF-Id, and register “vanity” PAF-Ids. *Id.* at 4-7.

III. COMMENTS

The Postal Service submitted its Preliminary Views on October 17, 2013. Comments were subsequently submitted by the Public Representative, PostCom, and Chris Phoenix. Additional responses were submitted by the Postal Service and Petitioner.

A. Postal Service Preliminary Views

In its Preliminary Views, the Postal Service indicates that it has independently considered product concepts similar to PAF. Preliminary Views at 2. Specifically, it refers to three product concepts. First, it refers to U.S. Patent No. 7,295,997, which describes a concept whereby customers can remain anonymous to merchants by use of “a unique identifier” that identifies the customer but does not include “the customer’s name or address information.” *Id.* Upon receiving packages addressed to the unique identifier, the Postal Service “may read or scan the label to determine the customer’s name and address” apply a new label, and ship the package. *Id.* Second, the Postal Service refers to its patent application for “Mail My Way,” a concept that would permit customers to use a virtual or vanity address in lieu of their mailing or physical address. *Id.* at 3. Third, the Postal Service points to its trademark application for “Digital License Plate,” a concept that includes providing authentication of personal identification, secure storage of personal information, and encoding of identification information on documents and products. *Id.* at 3, n.5.

The Postal Service asks the Commission to reject the Request to add PAF to the MCS. *Id.* at 11. It contends that the PAF proposal raises feasibility, privacy, and security issues. In terms of feasibility, the Postal Service contends that the establishment of a PAF product at this time would depend upon the availability of mail processing technologies and security and privacy systems not currently in existence, or

in the linkage of technologies not currently integrated. *Id.* at 10. It also states that applying the PAF concept to mail of all shapes and types would pose challenges given variances that exist for reading and confirming the validity of a recipient's address code and affixing barcodes or address labels.¹⁴ *Id.* at 5. In addition, the Postal Service indicates that there is presently no system in place for storing customer identity and address records for purposes of a potential product like Digital License Plate. *Id.* at 4. Presumably, there is no system in place for storing records for purposes of PAF as well.

The Postal Service states that PAF would conflict with its Privacy Act regulations, by prohibiting it from making routine disclosures to entities that perform identity verifications and credit risk assessments and to government agencies in connection with decisions to issue licenses, grants, or other benefits, and by requiring it to disclose name and address information to third parties in order to confirm convictions and other information. Preliminary Views at 6-7.¹⁵ In addition, it states that it would need to collect and store the information it collects from third parties in a PAF database. *Id.* at 7. The Postal Service also indicates that it would need to establish an appropriate level of compatibility with the National Institute of Standards and Technology cyber-security framework and other cyber-security protocols for any new information technology that it develops for the product. *Id.* at 4 n.6. In light of its feasibility, privacy, and security concerns, the Postal Service asks that the Commission reject the Request. *Id.* at 11.

¹⁴ In his amended proposal, Petitioner appears to address this concern by permitting the Postal Service to implement PAF incrementally, with letters first and parcels later. Motion to Amend at 1.

¹⁵ By making the refusal of service standards for PAF the same as the refusal of service standards for post office box service, in his amended proposal Petitioner appears to address the Postal Service's concerns about requiring disclosures to law enforcement authorities. Motion to Amend at 1-2.

B. Public Comments

1. Public Representative

The Public Representative expresses concern that the Postal Service “appears to be discouraging anyone, other than itself, from promoting proposals for new products.” PR Comments at 3. He contends that the Request “should alert the Postal Service that it is not doing enough to be open to ideas presented by individuals, and to make available avenues for these individuals to discuss new ideas.” *Id.* at 2. He would like to see that new ideas from outside entities are “given serious consideration.” *Id.* The Public Representative warns that the Postal Service, as a business, will not move forward, if it limits itself to consider only internally-conceived product ideas. *Id.* at 3.

The Public Representative believes that approving the Request would be premature. *Id.* at 4. He notes that the Postal Service opposes the Request, the product has not undergone sufficient development, and concludes that the Commission cannot require the Postal Service to offer a “non-essential” service such as PAF. *Id.* He indicates that further consideration would need to be given to issues such as zoned-rates, potentially nefarious uses of PAF, and cost and revenue projections before he could make a recommendation as to whether PAF should be added to the MCS. *Id.* at 3. The Public Representative recognizes that the Commission could reject the Request, but cautions that rejection could have a “chilling effect” on others seeking to present new product ideas. *Id.* at 4. He recommends that the Commission schedule a conference as a first step to instituting further proceedings. At the conference, consideration could be given as to what additional information in support of PAF is necessary to go forward and whether discovery should be instituted.¹⁶ *Id.* The Public Representative believes that PAF “may have potential,” but would need to be supported

¹⁶ The Public Representative identifies a potential difficulty with permitting Petitioner to issue discovery requests on the Postal Service. He recognizes that “discovery typically would not be available to delve into Postal Service deliberations concerning potentially similar product offerings.” *Id.* at 5.

with a business plan that, at minimum, quantifies demand, projected costs, and projected revenues. *Id.* at 4-5.

2. PostCom

PostCom urges the Commission to reject Petitioner's Request. PostCom Comments at 1. It contends that although the Commission's rules do not vest sole authority to develop and introduce products in the Postal Service, the rules permit the Commission to approve a request only if it is consistent with the Postal Service's position. *Id.* (citing 39 C.F.R. § 3020.55(a)). PostCom states that the Postal Service's views on the desirability of a proposed product should be accorded substantial weight. *Id.* at 2. It notes that unlike proposals for variations on existing products or new promotions, PAF would introduce an entirely new customer interface. *Id.* PostCom argues that it is unreasonable to require the Postal Service to incur expenses to resolve legal and operational issues in developing a PAF product with undetermined revenue potential. *Id.*

3. Phoenix

Phoenix expresses strong support for the PAF concept. Phoenix Comments at 1. He states that a permanent address descriptor like PAF would be convenient for customers who frequently move to new addresses. Phoenix recommends additional features, some of which are included in Petitioner's amended proposal: (1) PAF-Ids with additional characters, so typographical errors can be corrected, (2) a website or SMS gateway that would allow users to check whether a PAF-Id is valid and permit PAF-Id owners to provide additional information, and (3) an option to permit users to refuse unsolicited commercial mail through their PAF-Id. *Id.*

C. Reply Comments

1. Postal Service Reply Comments

In its reply comments, the Postal Service again asks the Commission to reject the request to add PAF to the MCS. Postal Service Reply Comments at 13. It states that Petitioner's proposed amendments, particularly the "vanity" PAF proposal, "raise a host of additional technical, cost, demand, and policy questions affecting the feasibility of the PAF product concept." *Id.* at 2.

The Postal Service describes its product development process as a competition for finite institutional resources. *Id.* at 5. It explains that management makes preliminary assessments of numerous competing concepts – both internally and externally generated – to determine which concepts to submit to "cross-functional analysis." *Id.* The preliminary assessments, which take into account the availability of resources, potential capital investment, the capabilities of internal systems, developmental lead time, potential demand, as well as other factors, enable management to prioritize competing proposals. *Id.* at 5-6. The Postal Service states that it is committed to product innovation and new ideas, and will support externally generated product concepts that have merit.¹⁷ However, it indicates that it should not be required to prove its commitment to product innovation by moving the PAF product concept ahead of numerous competing concepts. *Id.* at 8.

The Postal Service states that in the absence of an obligation to create a product to fulfill a specific statutory mandate or to correct a defect in the MCS, the Commission should accord it "broad deference" to plan and develop postal services. *Id.* at 10. It states that although it has developed product concepts similar to PAF, it has not yet subjected those concepts to technical or operational feasibility analysis or evaluated the

¹⁷ The Postal Service disagrees with the Public Representative's assertion that it "appears in effect to be discouraging anyone, other than itself, from promoting proposals for new products." Postal Service Reply Comments at 6 (*quoting* PR Comments at 2). It states that it regularly receives product suggestions from customers and regularly conducts market research to assess customer preferences. *Id.* at 7.

potential cost or demand. *Id.* The Postal Service asks the Commission to deny the Public Representative's proposal to schedule a conference, arguing that the "information necessary to go forward" with a PAF product concept would be the "fruits of an exhaustive cross-functional feasibility analysis," which has not taken place. *Id.* at 11. It contends that it would be unfair to expect management to set aside product development priorities in order to develop a business plan for a non-essential product such as PAF. *Id.* at 12.

2. Petitioner's Omnibus Motion and Surrebuttal

In his Omnibus Motion, Petitioner asks that the Commission: institute further proceedings; schedule a hearing on the Request; permit him to attend meetings and hearings through remote connection; and issue various declarations interpreting title 39, Commission regulations, and Postal Service regulations. Omnibus Motion at 2-3. In addition, Petitioner renews the request for documents that he previously made in his Motion for Disclosure. In his Omnibus Motion, Petitioner also asks that the Commission provide for a period of discovery, order the Postal Service to produce documents, and issue a subpoena for the documents. *Id.* at 2.

With respect to his discovery requests, Petitioner avers that the Postal Service has not provided sufficient evidence from which the Commission can render an "informed decision." Surrebuttal at 12. He contends that the Commission is required to review additional evidence concerning the Postal Service's similar product concepts before determining whether to approve or reject the Request.¹⁸ Omnibus Motion at 1-2. He accordingly asks the Commission to institute further proceedings and provide for discovery, so that it may render an informed decision, and the public may comment on the evidence. Surrebuttal at 10, 12. He argues that rendering a decision on the Request without first obtaining additional evidence would be "arbitrary, capricious,

¹⁸ Petitioner emphasizes that the evidence he seeks is contained in documents he believes to be currently in existence, rather than in the fruits of a feasibility analysis that has not yet been undertaken. Omnibus Motion at 2; Surrebuttal at 13.

unreasonable, an abuse of discretion, and unwarranted by any facts.” Omnibus Motion at 13.

In the alternative, Petitioner asks that if the Commission denies his discovery requests, that it issue a stay pending an appeal of his Freedom of Information Act (FOIA) request to the Postal Service seeking the same documents that he seeks in this proceeding.¹⁹ Omnibus Motion at 12.

Petitioner claims that section 401(2), as modified by the Postal Accountability and Enhancement Act (PAEA), shows that Congress intended to “subjugate the [Postal Service’s] ability to control its own rules and regulations to the PRC’s authority as well as to the mandates of the PAEA.” *Id.* at 6-7. Based on his interpretation of the amendments, Petitioner contends that the PAEA “revoked” the Postal Service’s unilateral authority to develop and plan new postal products. *Id.* at 6. Petitioner also asks that the Commission, exercising its authority under section 401(2), declare a provision in the Postal Service’s FOIA regulations unlawful. *Id.* at 12.

Petitioner contends that Commission rule 3020.55(a), insofar as it conditions approval of a request to add a product to the MCS on the request being “consistent with the position of the Postal Service,” is invalid. *Id.* at 15. He states that the Postal Service’s position is not among the statutory criteria that the Commission is to consider on a request to change the MCS. *Id.* Petitioner contends that the Commission is not permitted to give any deference to the Postal Service’s decisions as to which product concepts it wishes to prioritize. Surrebuttal at 11. He argues that to do so would provide the Postal Service with “veto power.” Omnibus Motion at 15. He claims that giving the Postal Service any authority over the Commission’s decision would constitute an unconstitutional delegation of the Commission’s rulemaking authority, and a violation of 39 U.S.C. § 503(a), which provides that the Commission’s “rules, regulations, procedures, and actions shall not be subject to any change or supervision by the Postal

¹⁹ In response to his FOIA request, the Postal Service provided Petitioner with 14 pages of documents consisting of trademark applications for the Mail My Way and Digital License Plate product concepts and slides describing the Mail My Way product concept. See Second Addendum, Exhibits.

Service.” *Id.* at 15-16. Petitioner asks that the Commission give the “narrowest possible reading” of section 3020.55(a), so as to give no deference to the position of the Postal Service. Surrebuttal at 3.

3. Postal Service’s Answer and Reply to Surrebuttal

The Postal Service asks that the Commission deny Petitioner’s discovery requests. It disputes Petitioner’s assertion that it possesses evidence concerning the feasibility of the PAF product concept. Answer at 15-16. It disclaims any knowledge as to whether PAF is technologically or otherwise feasible.²⁰ Answer at 24. It states that no feasibility analysis of the PAF product concept has been conducted. *Id.* at 16. With respect to the Mail My Way and Digital License Plate product concepts, the Postal Service contends that it has not undertaken the type of feasibility analysis for these concepts that would yield the evidence that Petitioner asserts is relevant to the present proceedings. *Id.* at 18. With respect to Petitioner’s subpoena request, the Postal Service suggests that insofar as the Commission determines that there is a need for additional information, a narrowly-crafted Presiding Officer’s Information Request would be a more effective method for obtaining relevant and necessary information. The Postal Service states that Petitioner’s request to remotely attend meetings and hearings is premature. *Id.* at 29.

The Postal Service disputes Petitioner’s claim that the PAEA amendment to section 401(2) diminished its authority, under section 403(a), to plan and develop postal products. *Id.* at 4-5. It states that the only substantive change that the PAEA amendment to section 401(2) made was to explicitly recognize the need to authorize the Postal Service to adopt rules and regulations to implement statutes not codified within title 39, and not, as Petitioner suggests, to “subjugate” the Postal Service’s rules and regulations to the Commission’s authority. *Id.* at 5.

²⁰ Petitioner argues that this uncertainty shows that there is insufficient evidence on the record from which to judge the merits of his proposal. Surrebuttal at 9.

The Postal Service disputes Petitioner's contention that 39 C.F.R. § 3020.55, to the extent it invites the Commission to consider whether a proposal is "consistent with the position of the Postal Service," provides it with veto power. *Id.* at 7. It states that this provision merely represents a good faith effort to ensure that the MCS complies with the policies of title 39 and to harmonize the Commission's authority under section 3642(a) to manage the process by which the MCS is changed with the Postal Service's authority under section 403(a) to plan and develop new products. *Id.* The Postal Service characterizes the Commission's role at this stage of the proceedings as rendering a procedural determination. It disagrees with Petitioner's assertion that the Commission is required, at this stage in the proceedings, to address whether the PAF concept is consistent with substantive requirements of section 3642(b). *Id.* at 10.

IV. COMMISSION ANALYSIS

A. Legal Framework

Section 3642(a) provides that:

Upon request of the Postal Service or users of the mails, or upon its own initiative, the Postal Regulatory Commission may change the list of market-dominant products under section 3621 and the list of competitive products under section 3631 by adding new products to the lists, removing products from the lists, or transferring products between the lists.

39 U.S.C. § 3642(a).

The Commission rules implementing requests to change the product lists are codified at 39 C.F.R. part 3020. Subpart A of those rules establishes the MCS and provides that it consists of two product lists. Subparts B through D of those rules provide procedures for modifying the MCS, with subpart B governing requests initiated by the Postal Service, subpart C governing requests initiated by users of the mail, and subpart D governing proposals initiated by the Commission. Petitioner filed his Request pursuant to subpart C, which provides as follows:

The Commission shall review the request, the Postal Service reply, and any public comment to determine whether the proposed modification to the market dominant and competitive product lists complies with applicable statutory requirements and the Commission's rules, and whether the proposed modification is consistent with the position of the Postal Service as expressed in its reply.

39 C.F.R. § 3020.55.

Upon concluding its review, the Commission is required to take one of four actions. It can:

- (a) Approve the request to modify the market dominant and competitive product lists, but only to the extent the modification is consistent with the position of the Postal Service;
- (b) Reject the request;
- (c) Institute further proceedings to consider the request to modify the market dominant and competitive product lists; or
- (d) Direct other action as the Commission may consider appropriate.

Id.

B. Commission Action on the Request

The primary issue in dispute is what action the Commission should take on the Request. No participant contends that the Commission should approve the Request at this time. The participants disagree as to whether the Commission should reject the Request or institute further proceedings.

The Postal Service argues that the Commission should reject the Request. It states that it has considered concepts similar to PAF but has not analyzed whether those concepts, or Petitioner's PAF concept, are feasible. Answer at 15-16. The Postal Service contends that to establish a PAF product would require the creation of mail processing technologies and security and privacy systems that do not currently exist, or which would require integration of technologies that are not currently integrated. Preliminary Views at 10. The Postal Service asks that the Commission accord

management broad deference in exercising its authority to plan and develop postal services. Postal Service Reply Comments at 10. PostCom agrees that the Request should be rejected. PostCom Comments at 1. It contends that the Postal Service's views on the desirability of a proposed product should be accorded substantial weight. *Id.* at 2.

Petitioner urges the Commission to institute further proceedings. He contends that the Commission must first review additional evidence about similar product concepts in order to make an informed decision on the Request. Surrebuttal at 12, 14. Petitioner argues that the Commission should give no deference to the position of the Postal Service. *Id.* at 3.

While recognizing that the Commission could reject the Request, the Public Representative expresses concern that rejection would have a chilling effect on others seeking to present new product ideas. In lieu of rejection, the Public Representative suggests actions the Commission could initiate, *e.g.*, convening a conference to determine "what additional information in support of PAF is necessary to go forward, and the possibility of discovery." PR Comments at 4. The Public Representative concludes that a hearing on the merits would be premature. *Id.*

As a threshold matter, the Commission reviews the Request, the Postal Service reply, and any public comments received to determine whether the proposal complies with statutory and regulatory requirements and is consistent with the position of the Postal Service. 39 C.F.R. § 3020.55. Although participants raise various concerns, no participant appears to contend that the Request should be rejected for failing to satisfy applicable statutory and regulatory requirements.²¹ Nonetheless, fundamental questions about the proposal have been raised, including the Postal Service's opposition to its implementation. For the reasons expressed below, the Commission

²¹ The Postal Service indicates that some aspects of the proposal may violate its Privacy Act regulations. Preliminary Views at 6 & n.9. However, Petitioner's apparent willingness to modify the proposal to address the Postal Service's concerns suggests that the proposal could be aligned with the Postal Service's regulations.

rejects the Request. Because the Commission rejects the Request, Petitioner's requests (Omnibus Motion at 2-3) that the Commission institute further proceedings, schedule a hearing, permit remote attendance at meetings and hearings, and issue various factual and legal declarations are denied as moot.

The Commission appreciates that Petitioner is the first person, other than the Postal Service, to invoke section 3642 and related Commission regulations seeking to add a product to the MCS product lists. By instituting these proceedings, Petitioner has enabled the Commission to consider his proposal as well as the relevant legal framework surrounding section 3642 and the Commission's implementing regulations at 39 C.F.R. part 3020, subpart C. That said, it is incumbent on any petitioner to come forward with a proposal that is both feasible and not likely to impede or have an adverse impact on Postal Service operations. The proposal is deficient in this and other regards.

Petitioner candidly states that "[t]here is no evidence in the record *whatsoever* based on which the [Commission] can make the statutorily mandated determinations about my proposal." Omnibus Motion at 1 (emphasis in original). He contends, however, that the Postal Service possesses "pertinent evidence" about PAF's feasibility. *Id.* To that end, he argues that the Commission "is obliged" to obtain that information or otherwise this proceeding will be a "meaningless sham." *Id.*

For its part, the Postal Service denies that it has any relevant information about the feasibility of the PAF concept. Answer at 15. It states that no feasibility analysis of PAF has been conducted. *Id.* at 16.

Petitioner apparently never engaged the Postal Service in an effort to discuss the PAF concept prior to filing his Request. Given the nature of the proposal, replete with technological, financial, and operational implications, as opposed, for example, to a proposal to modify an existing product, failure to consult with the operator is problematic. While section 3642 authorizes any person to request that a product be added to the product lists, it does not shift the burden of demonstrating that the product is feasible to the Postal Service. A request must be evaluated on its own merits.

Because, among other things, PAF's feasibility has not been shown, it is premature to institute further proceedings.

Instituting further proceedings at this juncture would be premature for other reasons as well. It is clear that little consideration has yet been given to essential practical aspects of the PAF proposal. No estimate of the costs associated with implementing and operating PAF has been made. Nor has there been an estimate of the revenue the product is expected to generate. Absolute precision is not required, but a petitioner must provide some reasonable showing of customer demand for the proposed product and its financial effect on the Postal Service. The instant proposal contains none of that information.²²

As amended, the proposal is to provide PAF-Ids to individuals at no charge, and to permit those users to opt out of certain types of mail. Although Petitioner proposes to charge bulk mailers for the service, he makes no showing that there is any demand for PAF among the bulk mailer market segment. Moreover, the implications of the proposal, if proven feasible, are far-reaching. A proposed option would enable PAF-Id owners to instruct the Postal Service to stop delivering certain types of mail which, in turn, could result in substantial volume losses. Absent consideration of these various matters by Petitioner, it is premature for the proposal to be set for further proceedings.

The Postal Service's position, consistently stated, is that it should not be required to reprioritize competing product proposals by subjecting PAF to a feasibility analysis. Answer at 9. Subject to certain limitations, Congress has delegated to the Postal Service authority to plan, develop, promote, and provide adequate and efficient postal services. 39 U.S.C. § 403(a). The Commission does not take lightly the potential to interrupt the product development process by instituting further proceedings on a proposal the feasibility of which is in doubt. Instituting further proceedings at this juncture may force the Postal Service to reorder its product development priorities, an intrusion that is not warranted based on the lack of a more fully developed proposal.

²² Instituting further proceedings as advocated by Petitioner to explore the workings of somewhat similar concepts that the Postal Service has considered will not shed light on those issues.

In rejecting the Request to add PAF to the MCS, the Commission has, as its rules require, considered the position of the Postal Service. In matters pertaining to the development of new products, the Commission accords the Postal Service's views substantial weight. The Commission rejects the claim that section 503 precludes it from considering the position of the Postal Service on the Request. While section 503 does ensure that Commission rules, regulations, procedures, and actions will not be subject to any change or supervision by the Postal Service, it also empowers the Commission to take any action it deems "necessary and proper" in carrying out its functions. In proceedings to change the MCS that are initiated by users of the mail, the views of the operator are not insignificant. As the Commission explained when it proposed these rules, "[i]t would be impractical to proceed with a request that was operationally not feasible for the Postal Service to implement, or inconsistent with Postal Service policies and goals."²³ To be clear, in according substantial weight to the position of the Postal Service, the Commission is not abdicating its authority to approve or reject a request.

Rejection of the Request should not have a chilling effect on other persons seeking to add products to the MCS. For one, the Postal Service assures the Commission that it "will not hesitate to inform the Commission when it sees merit in the immediate examination under section 3642 of any externally generated product concept." Postal Service Reply Comments at 8. To determine whether a proposal has merit, the Postal Service needs to make a preliminary determination and consider, at minimum, the proposal's feasibility, cost, customer demand, and revenue potential. While agreeing that the Postal Service need not subject every proposal to a full cross-functional feasibility analysis, the Commission expects that the Postal Service will, as it has here, make a preliminary determination as to whether the proposal has merit.

Submitting a formal request to the Commission to add a product to the MCS is one of several means by which persons with new product ideas can get those ideas before the Postal Service. Less formal means include approaching the Postal Service

²³ Docket RM2007-1, Order No. 26, Order Proposing Regulations to Establish a System of Ratemaking, August 15, 2007, at 93-94.

directly. The Postal Service states that it encourages customers to present new product ideas directly to it. *Id.* at 8. Customers can, for example, submit ideas directly to the Postal Service through its website.²⁴ The website queries ask the proponent to describe the proposal's benefit, to describe how it would be implemented, to identify the target customers, and to provide an estimated revenue potential. By using these channels, customers can describe the most salient features of their product proposal for the Postal Service's consideration. In doing so, customers should be able to get some feedback from the Postal Service on the merits of their proposal. This approach would also provide an opportunity for the proponent and the Postal Service to discuss any legal and intellectual property issues that arise with respect to the proposal.

C. Discovery Requests

In his Motion for Disclosure, Petitioner asked for five groups of documents relating to PAF and the three similar product concepts, including:

1. investigations of "availability of technology, operational feasibility, associated costs, potential demand marketability, [and/or] policy implications" of such proposals;
2. the "direction [and/or] prioritization of [] pre-decisional product development investigations" of such proposals;
3. feasibility or technical standards for record storage systems for such proposals and/or for PO Box holder identities;
4. "procedures in place that protect the identities and street addresses of individuals" and associated "record system[s]";
5. the "relative rankings of DLP" and other such proposals with respect to unrelated proposals contemplated by the USPS.

Motion for Disclosure at 2-3.

²⁴ See <https://prodpx-promotool.usps.com/promoreg/campaignView.do?campaignId=INNOVA1>.

In his Omnibus Motion, Petitioner renews this document request. Omnibus Motion at 2. He seeks these documents through a Commission order or a Commission-issued subpoena. *Id.* Petitioner also requests that the Commission provide for a period of discovery. *Id.* He contends that documents responsive to this request are relevant to the current proceedings and that a Commission failure to review such documents before making a determination on his Request would be “arbitrary, capricious, unreasonable, an abuse of discretion, and unwarranted by any facts.” *Id.* at 13.

Petitioner requested the same documents directly from the Postal Service, by making a FOIA request. See Omnibus Motion, Attachment. In response to that request, the Postal Service produced 14 pages of documents, consisting of trademark applications for the Mail My Way and Digital License Plate concepts and slides describing the Mail My Way concept.

The Postal Service asks that the Commission deny the discovery requests. Answer at 26-29. With respect to information about PAF, the Postal Service asserts that it has no documents other than those provided in this docket. *Id.* at 26. It contends that it has never undertaken a feasibility analysis of the Digital License Plate and Mail My Way concepts, or of Petitioner’s PAF proposal. *Id.* at 16. In addition, with respect to requests numbers 2 and 5, it argues that the responsive records are likely to contain predecisional deliberations, the release of which could harm the predecisional process and cause competitive injury to the Postal Service. *Id.* at 27-28. The Postal Service argues that it would be an abuse of the Commission’s discovery rules to permit Petitioner to use those rules to circumvent having to compensate the Postal Service under the FOIA for the costs of a search for the documents. *Id.* at 27.

In its order on Petitioner’s Motion for Disclosure, the Commission explained that although the rules do not provide for discovery *prior* to determining whether a proposal satisfies the requirements rule 3020.55, the rules do allow for a period of discovery *following* that determination. Order No. 1868 at 4. The Commission explained that the rules, by creating a two-step process, permit the Commission to act as a gate-keeper and first make an initial determination on the proposal before taking further action. *Id.*

The Commission denies the discovery request. The primary issue before the Commission is the threshold determination as to what action the Commission should take on the Request. The Commission has determined that the Request should be rejected, and that further proceedings should not be initiated. Because of this determination on the primary issue, discovery would serve no useful role in the present docket.

Petitioner suggests that a Commission determination at this juncture would be insufficiently informed. Contrary to Petitioner's assertion, the Commission has sufficient information to determine that it should reject the Request. Even assuming additional information concerning similar concepts were available, it seems unlikely that such information would be relevant here. In determining whether to institute further proceedings, the Commission looks at the PAF product concept, which stands on its own. The Postal Service states that it has no additional information on the PAF proposal. Further discovery at this stage of the proceedings would not appreciably inform the relevant analysis.

D. Request to Declare FOIA Regulations Invalid

In his Omnibus Motion, Petitioner documents his ongoing dispute with the Postal Service over its response to his FOIA request. See Omnibus Motion at 9-13. Petitioner disputes the timeliness of the Postal Service's response, its method of calculating estimated fees, and its denial of his fee waiver request. While Petitioner recognizes that the Commission is not the forum in which to appeal the adequacy of the Postal Service's response to his request, he claims that the Commission has authority, pursuant to 39 U.S.C. § 401(2), to declare the Postal Service's FOIA fee waiver rule (39 C.F.R. § 265.9(g)(3)(v)) unlawful.²⁵ *Id.* at 11-12. Petitioner contends that Congress, by amending section 401(2), has evinced an intent to "restrict the USPS, and

²⁵ In the event that the Commission denies Petitioner's discovery requests, he asks that the Commission issue a stay pending judicial appeal of his FOIA dispute with the Postal Service.

to subjugate the USPS' ability to control its own rules and regulations to the PRC's authority as well as to the mandates of the PAEA." *Id.* at 6-7.

Section 401, which lists the general powers of the Postal Service, provides that the Postal Service shall have the power:

to adopt, amend, and repeal such rules and regulations, not inconsistent with this title, as may be necessary in the execution of its functions under this title and such other functions as may be assigned to the Postal Service under any provisions of law outside of this title;

39 U.S.C. § 401(2). The Postal Service states that both before and after enactment of the PAEA, section 401(2) has constrained it to adopt regulations that are consistent with its authority under title 39. Answer at 4. It contends that the only change to section 401(2) wrought by the PAEA was recognition of the need to authorize the Postal Service to adopt rules implementing statutes outside of title 39. *Id.* at 5.

The issue that is currently before the Commission is Petitioner's request to add PAF to the MCS. Petitioner's request to the Postal Service, pursuant to the FOIA, for records that he believes might inform the current proceeding is outside the Commission's purview. Similarly, the request that the Commission rule on the lawfulness of a Postal Service FOIA regulation is misplaced. Petitioner's Request to add PAF to the product lists arises under section 3642 and has been considered in this docket. His FOIA request and any issues related to it are not properly before the Commission in this docket.²⁶ Petitioner's request that the Commission declare the Postal Service's FOIA regulations unlawful is accordingly denied.

Petitioner's request that the Commission stay the current proceedings pending judicial review of his FOIA appeal is also denied. Petitioner will not be prejudiced by

²⁶ The Postal Service treats Petitioner's motion as a request to declare the Postal Service's *response* to his FOIA request for a fee waiver as unlawful. Petitioner explicitly recognizes that the Commission is not the forum to which to direct an appeal of the Postal Service's response to his FOIA request. He argues instead that the PRC has the authority "to declare that 39 CFR 265.9(g)(3)(v) was an unlawful action by the USPS." The Commission accordingly treats Petitioner's motion as a request to declare the FOIA regulation itself, rather than the Postal Service response to Petitioner's FOIA request, as unlawful.

denial of his request for a stay. If Petitioner ultimately obtains records that provide a basis for instituting further proceedings, he may file a new petition with the Commission to add PAF to the MCS based upon new information.

V. ORDERING PARAGRAPHS

It is ordered:

1. The request to add PAF to the MCS is rejected.
2. The requests to provide for a period of discovery and to order the Postal Service to produce documents are denied.
3. The request to declare the Postal Service's FOIA regulations unlawful is denied.
4. All pending motions not otherwise acted upon in this Order are hereby denied.

By the Commission.

Ruth Ann Abrams
Acting Secretary